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Disability discrimination: recasting the parameters of proprietary rights?

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I. INTRODUCTION

This chapter examines the potential ramifications for proprietary rights of landlords where tenants raise disability discrimination defences under the Equality Act 2010 to landlords' claims for possession. Such ramifications could have far-reaching consequences for both public and private landlords in that such defences will be more extensive than the protection given to tenants under Article 8 of the European Convention on Human Rights. Disability discrimination defences are contrasted with alternative defences against possession raised under Article 8¹ in order to analyse the breadth and prospects of success of disability discrimination defences under section 15 Equality Act 2010 following the Supreme Court decision in *Aster Communities Ltd v Akerman-Livingstone* (hereinafter referred to as *Akerman*).² This comparison highlights how the substantive right to equal treatment under the Equality Act differs from the substantive right protected by Article 8 and shows how a proportionate means of achieving a legitimate aim is interpreted and applied in each framework. The potential impact of the breadth of the definition of disability is also considered in this context. In addition, the consequences of section 35 Equality Act applying to both private and public sector landlords, the burden of proof on the alleged discriminator and the landlord's duty to make reasonable adjustments under the Equality Act are all analysed.

The Supreme Court in *Akerman* opened new avenues for tenants in possession cases by making it much harder for landlords to obtain possession where a tenant successfully claims discrimination arising from a disability under the Equality Act 2010. The Supreme Court agreed unanimously that a disability defence to possession can rarely be decided summarily unlike the position with a defence raised under Article 8.³ It was accepted that the defendant was suffering from a disability under section 6 of the Equality Act 2010. He refused offers of alternative suitable accommodation, and the landlord claimed possession which was granted by Judge Denyer QC who treated the issue of proportionality under article 8 and section 15 Equality Act 2010 in the same way following *Manchester City Council v Pinnock*⁴ and *Hounslow LBC v Powell*⁵ as applied in *Thurrock Borough Council v West*.⁶ Judge Denyer QC did, however, grant permission to appeal on the issue of whether the discrimination defence should be treated in the same way as an article 8 defence. The appeal

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¹ See *Manchester City Council v Pinnock* [2010] UKSC 45, [2010] 3 WLR 1441; *Hounslow London Borough Council v Powell* [2011] UKSC 8, [2011] 2 WLR 287. See also *Thurrock Borough Council v West* [2012] EWCA Civ 1435, [2013] HLR 69; *R (JL) v Secretary of State for Defence* [2013] EWCA Civ 449, [2013] HLR 27; *Sims v Dacorum Borough Council* [2014] UKSC 63, [2014] 3 WLR 1600; *R (N) v Lewisham London Borough Council* [2014] UKSC 62, [2014] 3 WLR 1548.

² *Aster Communities Ltd v Akerman-Livingstone* [2015] UKSC 15, [2015] 2 WLR 721.

³ See *Pinnock*, *Powell*, *Thurrock* and *Lewisham* (n 1).

⁴ *Pinnock* (n 1).

⁵ *Powell* (n 1).

⁶ *Thurrock* (n 1).

was dismissed by Cranston J and also dismissed by the Court of Appeal,⁷ which held that the approach to proportionality was the same under the Equality Act as it was under article 8. The appeal was dismissed by the Supreme Court on the grounds that the landlord urgently needed vacant possession of the flat occupied by the tenant in order to comply with its own legal obligations to give vacant possession to the freeholder. The Supreme Court, therefore, felt bound to conclude that the eviction would be a proportionate means of achieving a legitimate aim and that by securing his eviction, the landlord would not be discriminating against him. Nevertheless, the decision is of considerable significance because of the Supreme Court agreeing unanimously that a structured approach to proportionality had to be adopted in cases under the Equality Act and that disability discrimination defences should not be treated in the same way as article 8 defences.

Section 15 deals specifically with discrimination arising from disability providing that a person discriminates against a disabled person if he treats that person unfavourably because of something arising in consequence of his disability under s. 15(1)(a), and he cannot show that the treatment is a proportionate means of achieving a legitimate aim under s. 15(1)(b). Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had a disability.⁸ Section 15 does not require a comparator, and there is also no need to show detriment under section 15, merely unfavourable treatment. Section 15 applies to eviction due to section 35(1) which provides that, 'A person (A) who manages premises must not discriminate against a person (B) who occupies the premises ... (b) by evicting B (or taking steps for the purpose of securing B's eviction)'.

II. COMPARISON BETWEEN DEFENCE OF DISABILITY DISCRIMINATION UNDER EQUALITY ACT AND DEFENCE UNDER ARTICLE 8

The values which underpin both equality and human rights are shared values which derive from the Universal Declaration of Human Rights 1948 which states that, 'All human beings are born free and equal in dignity and in rights'. The values of equality and human rights centre on fairness, equality, dignity, respect, autonomy, empowerment and participation. The European Convention on Human Rights was a response to the Second World War and its intention was to guarantee a range of political rights and freedoms of the individual against interference by the State. Article 8, namely the right to respect for the home, subject to interference by a public authority for the protection of the rights and freedoms of others, has been the subject of defences in a substantial number of possession proceedings cases. By way of contrast, the Equality Act originated from what Hepple terms 'A history of bits and pieces'⁹ deriving from piecemeal legislation. The Equality Act was a major landmark in the long struggle for equal rights and was the outcome of over 13 years of campaigning by equality specialists and human rights organisations.¹⁰ Hepple views the establishment of the Equality and Human Rights Commission and a single Equality Act as 'an historic reunification of equality and human rights law, back to its origins in the Universal

⁷ *Akerman* (n 2).

⁸ Equality Act 2010, s 15(2).

⁹ B Hepple, *Equality: The Legal Framework*, 2nd edn (Oxford, Hart Publishing Ltd, 2014) 11.

¹⁰ Hepple, *ibid*, 1-2.

Declaration of Human Rights'.¹¹ The Equality Act 2010 is a significant tool in endeavouring to achieve status equality and prevent status discrimination.¹²

The Supreme Court in *Akerman* had numerous grounds as the basis for their decision that defences under the Equality Act are to be treated differently from defences under article 8. The differentiating tests for proportionality which have emerged from *Akerman* must necessarily focus on the differentiation in purpose of the provisions.

A. Consequences for private landlords versus public landlords

Section 35 Equality Act applies to private and public sector landlords whereas only public authorities and bodies exercising functions of a public nature¹³ are obliged by s. 6 Human Rights Act 1998 to act compatibly with Convention rights.¹⁴ The consequence is that neither a public nor private landlord can evict a disabled tenant because of something arising in consequence of the disability unless the landlord can show this is a proportionate means of achieving a legitimate aim. Baroness Hale stated that this difference demonstrates that the substantive right to equal treatment protected by the Equality Act 2010 is different from the substantive right which is protected by article 8.¹⁵ It is axiomatic that the rights are substantively different, because the legislative requirements of the Equality Act 2010 and Human Rights Act 1998 vary despite the common foundation of values.

Private landlords may be perceived in some circumstances to be performing a social welfare and/or civic duty under the Equality Act, since 'Landlords may be required to accommodate, or to continue to accommodate, a disabled person when they would not be required to accommodate, or continue to accommodate, a non-disabled person',¹⁶ which may be particularly onerous for private landlords. For example, if a tenant becomes disabled due to an accident and earns a lower salary due to restrictions on the nature of employment available to such a person with disability, a landlord might be prevented from taking possession proceedings and have to accept a lower rent if the tenant with the disability cannot afford the rent which was agreed at the beginning of the tenancy (subject to the proportionality test which will be examined later).

An additional question which needs to be analysed as a result of the decision in *Akerman* is whether the Equality Act will impact private landlords seeking to obtain possession under assured shorthold tenancies under the Housing Act 1988, and whether a tenant may raise a defence when a landlord serves notice requiring possession at the end of a fixed term assured shorthold tenancy under section 21(1)(b) Housing Act 1988. Following the Supreme Court decision in *McDonald v McDonald*¹⁷ that a court did not have to consider proportionality under article 8(2) when considering whether to make a possession order against a residential tenant of a private landlord and that there was no obligation to assess proportionality under section 21(4) Housing Act 1988, it is unlikely that a challenge under

¹¹ See further Hepple, *ibid*, 19-20.

¹² Terminology used by Hepple, *ibid*, 22-23.

¹³ See *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 WLR 363.

¹⁴ See further *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45.

¹⁵ *Akerman* (n 2) [25].

¹⁶ *Akerman* (n 2) [25] (Baroness Hale).

¹⁷ *McDonald* (n 14).

section 15 Equality Act would be successful other than to postpone an order for possession. Lord Neuberger's view in *McDonald* was that even if a proportionality assessment was required, the most a tenant could hope for would be an order for possession in six weeks' time.¹⁸

B. Difference in burden of proof under s. 15 and article 8

Another indicator that the position in relation to Article 8 cases and Equality Act cases are to be treated in disparate ways is the differential provision in relation to burden of proof. The Equality Act 2010 contains express provisions relating to the burden of proof. Once a *prima facie* case of discrimination is made out, the burden of proof is firmly on the landlord to show that there was no discrimination contrary to section 15(1)(a), or that an order for possession is proportionate under section 15(1)(b), of the 2010 Act. The effect of section 136 of the Equality Act 2010 is that if the court could conclude that an eviction was because of something arising in consequence of a person's disability, then the alleged discriminator has to prove that it was not. If he could not do so, the burden would then be on him to show that the eviction was nevertheless a proportionate means of achieving a legitimate aim.¹⁹ If the claim is for indirect discrimination, for example that the landlord has imposed a requirement on its tenants which puts tenants with disabilities at a particular disadvantage, the landlord has to show there was a valid reason for doing so unrelated to the disability.²⁰ The provisions of section 19 relating to indirect discrimination apply, which will add greater protection for tenants with disabilities.

By way of comparison, the general position under the Human Rights Act 1998 is that once an interference with the protected right is established, the burden shifts to the public authority to prove that the interference is justified.²¹ Baroness Hale's summation of the proportionality exercise under section 15 is that 'If it is a claim of disability discrimination under section 15, then the landlord would have to show that there was no less drastic means of solving the problem and that the effect on the occupier was outweighed by the advantages'.²² Baroness Hale is correct that, 'The express burden of proof provisions in the Equality Act cannot simply be ignored because there are some elements in the proportionality exercise which can be taken for granted'.²³ Lord Neuberger confirmed that all that is needed for the tenant is to make out the possibility of discrimination, then the burden of proof is firmly on the landlord to prove that there was no discrimination contrary to section 15(1)(a) or that an order is proportionate under section 15(1)(b).²⁴ This is a significant improvement for tenants with disabilities, since article 8 does not offer a substantial defence to or protection from possession claims, and this may be one justification for the divergence in proportionality tests in the two regimes.

¹⁸ *McDonald* (n 14) [75].

¹⁹ *Akerman* (n 2) [19] (Baroness Hale).

²⁰ *Woodfall: Landlord and Tenant* vol 3, pt 11, ch 25 para 25.050.4, and *Akerman* (n 2) [34] (Baroness Hale).

²¹ *Akerman* (n 2) [33] (Baroness Hale).

²² *Akerman* (n 2) [34] (Baroness Hale).

²³ *Akerman* (n 2) [34] (Baroness Hale).

²⁴ *Akerman* (n 2) [55] (Lord Neuberger).

C. Difference in proportionality tests under s. 15 and article 8: equality rights versus Convention rights

The wording of the objective justification test in each provision is different. The question in section 15(1)(b) is whether ‘the treatment is a proportionate means of achieving a legitimate aim’ whereas in article 8, the issue is whether interference is ‘necessary in a democratic society’ for one of the specific purposes listed in article 8(2).²⁵ As Baroness Hale recognised, ‘they have come to be interpreted the same way’,²⁶ but the Supreme Court held in *Akerman* that they are to be interpreted and applied differently.

i. Proportionality under s. 15 Equality Act 2010

As a result of the decision in *Akerman*, a trial court must undertake a thorough analysis of the proportionality issue, which is a welcome development for equality rights. Baroness Hale explained the three elements set out by Mummery LJ in *R (Elias) v Secretary of State for Defence*²⁷ and a fourth element set out in Lord Reed’s dissenting judgment in *Bank Mellat v HM Treasury (No 2)*,²⁸ although Lord Neuberger in *Akerman* only referred to the three-stage test. It remains to be determined whether the disparity is substantial and if it may have practical consequences.

As Baroness Hale recognised,²⁹ the concept of proportionality contained in section 15 is derived from European Union law, which is the source of much of the anti-discrimination legislation. The three elements expounded by Mummery LJ in *R (Elias) v Secretary of State for Defence* were: ‘First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?’³⁰ The fourth element identified by Baroness Hale³¹ is that ‘the disadvantages caused must not be disproportionate to the aims pursued’³² or ‘whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure’.³³ This fourth element is the factor most likely to swing the pendulum in favour of the person with the disability, because it acknowledges that ‘the ends, however meritorious, cannot justify the only means which is capable of achieving them’.³⁴

²⁵ These include ‘the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others’.

²⁶ *Akerman* (n 2) [27].

²⁷ *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213 [165].

²⁸ *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700 [71].

²⁹ *Akerman* (n 2) [28].

³⁰ *R (Elias) v Secretary of State for Defence* (n 27) [165]. These elements were derived from *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 which itself was derived from the Canadian case *R v Oakes* [1986] 1 SCR 103.

³¹ *Akerman* (n 2) [28] deriving from Lord Reed JSC in *Bank Mellat v HM Treasury (No 2)* (n 28) [68] et seq.

³² Citing from Court of Justice of European Communities in *R v Minister for Agriculture, Fisheries and Food Ex p Fedesa* (Case C-331/88) [1990] ECR I-4023 [13].

³³ Citing from *Bank Mellat v HM Treasury (No 2)* (n 28) [74] (Lord Reed).

³⁴ *Akerman* (n 2) [28] (Baroness Hale).

A helpful overview of proportionality was undertaken in Lord Reed's dissenting judgment in *Bank Mellat v HM Treasury (No 2)*³⁵ in which he recognised that 'An assessment of proportionality involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon'.³⁶ He undertook a valuable comparison of the approach to proportionality at a national level and at the Strasbourg court and stated that the Strasbourg court recognises that it may be less well placed than a national court to decide the appropriate balance in the particular national context.³⁷

What is notable about Lord Neuberger's judgment in *Akerman* is that in the penultimate paragraph of his judgment, in seeming to agree with Baroness Hale, Lord Neuberger referred to 'the right test' being 'the threefold approach identified by Mummery LJ in the *Elias* case, para 165',³⁸ but did not refer to the fourth element.³⁹ This may indicate that Lord Neuberger did not consider that this fourth element is necessary nor adds to the dynamics of the decision-making process. Alternatively, Lord Neuberger could be advocating a more categorical approach which is less nuanced than that set out by Baroness Hale. By omitting reference to the fourth element, Lord Neuberger has arguably made it easier in future cases for those denying disability discrimination.

Lord Wilson in *Akerman* did, however, state that the court should adopt a four-stage structured approach to the claimant's attempt to show that the steps for securing the defendant's eviction are a proportionate means of achieving a legitimate aim (without citing the authority or case for this).⁴⁰ In relation to the fourth element, Lord Wilson stated that

For the eviction may be proportionate to the claimant's objectives without being proportionate in the necessary wider sense. Section 15(1)(b) of the 2010 Act requires the claimant to show that the eviction strikes a fair balance between its need to accomplish its objectives and the disadvantages thereby caused to the defendant as a disabled person.⁴¹

This introduces the concept of proportionality 'in the necessary wider sense', and it appears that the fourth element is necessary to establish proportionality in the wider sense.⁴²

However, importing notions of proportionality in a wider sense and narrower sense encourages litigation due to uncertainty of boundaries and unpredictability of decisions.

ii. Threshold/Proportionality under article 8

A completely different approach has been taken to proportionality under article 8. In *Pinnock*⁴³ and *Powell*,⁴⁴ the Supreme Court rejected the 'structured approach' to

³⁵ *Bank Mellat v HM Treasury (No 2)* (n 28). This was undertaken in the context of human rights in the European Convention on Human Rights.

³⁶ *Bank Mellat v HM Treasury (No 2)* (n 28) [71] (Lord Reed).

³⁷ *Bank Mellat v HM Treasury (No 2)* (n 28) [71] (Lord Reed).

³⁸ *Akerman* (n 2) [62] (Lord Neuberger).

³⁹ *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa* (n 32) [13].

⁴⁰ *Akerman* (n 2) [64] (Lord Wilson).

⁴¹ *Akerman* (n 2) [73] (Lord Wilson).

⁴² See also *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] AC 167.

⁴³ *Pinnock* (n 1).

⁴⁴ *Powell* (n 1).

proportionality. Baroness Hale in *Akerman* quoted from Lord Hope in *Powell* who rejected that approach

in the context of a statutory regime that has been deliberately designed by Parliament, for sound reasons of social policy, so as not to provide the occupier with a secure tenancy [the structured approach] would be wholly inappropriate. ... It would give rise to the risk of prolonged and expensive litigation, which would divert funds from the uses to which they should be put to promote social housing in the area.⁴⁵

Baroness Hale, who was a judge in both *Pinnock* and *Powell*, agreed that the two legitimate aims identified by Lord Neuberger in *Pinnock*⁴⁶ were valid in article 8 cases. Making a possession order would ‘(a) serve to vindicate the authority’s ownership rights; and (b) enable the authority to comply with its public duties in relation to the allocation and management of its housing stock’.⁴⁷ In relation to article 8, the position as a result of *Pinnock* and *Powell* is that, ‘The court will only have to consider whether the making of a possession order is proportionate if the issue has been raised by the occupier and it has crossed the high threshold of being seriously arguable’⁴⁸ and would only succeed in ‘a small proportion of cases’.⁴⁹

As Lord Neuberger stated in *Pinnock*:

Unencumbered property rights, even where they are enjoyed by a public body such as a local authority, are of real weight when it comes to proportionality ... in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate.⁵⁰

The key words are those in the sentence following the preceding quote that, ‘However, in some cases there may be factors which would tell the other way’.

In neither *Pinnock*⁵¹ nor *Powell*⁵² did the Supreme Court provide clear guidance on how to balance occupier’s personal circumstances against the local authority’s legitimate aims in determining the proportionality of making a possession order.⁵³ The Supreme Court expressly left it to county court judges to decide, but guidance is needed on the more difficult issues relating to exceptional personal circumstances for the purposes of article 8. Article 8

⁴⁵ *Powell* (n 1) [41].

⁴⁶ *Pinnock* (n 1) [52].

⁴⁷ Derived from *Pinnock* (n 1) [52] and supported in *Powell* (n 1) [36].

⁴⁸ *Powell* (n 1) [33] (Lord Hope).

⁴⁹ *Powell* (n 1) [35] (Lord Hope).

⁵⁰ *Pinnock* (n 1) [54].

⁵¹ *Pinnock* (n 1).

⁵² *Powell* (n 1).

⁵³ S Pascoe, ‘Europe, Human Rights and Land Law in the Twenty-First Century: An English Example’ (2011) *Property Law Review* 179. See also generally S Nield, ‘Article 8 Respect for the Home: a Human Property Right’ (2013) 24 *King’s Law Journal* 147; I Loveland, ‘Horizontality of Article 8 in the Context of Possession Proceedings’ [2015] EHRLR 138; R Walsh, ‘Stability and Predictability in English Property Law- the Impact of Article 8 of the European Convention on Human Rights Reassessed’ (2015) 131 LQR 585; S Nield, ‘Thumbs down to the Horizontal Effect of Article 8’ [2015] Conv 77.

defences have not been successful in the vast majority of cases⁵⁴ subsequent to *Pinnock*⁵⁵ and *Powell*⁵⁶ though there have been cases where tenants have been successful.⁵⁷ As a result of *Akerman*, it is likely to be only in a minority of situations that cases under section 15 Equality Act 2010 will be dismissed summarily, which will happen if the landlord can show (i) the defendant has no real prospect of showing he is disabled within the meaning of the Act; or (ii) possession was not being sought because of something arising in consequence of the disability; or (iii) bringing and enforcing the claim were plainly a proportionate means of achieving a legitimate aim.⁵⁸ The court has to undertake the proportionality exercise itself.⁵⁹ Lord Neuberger was realistic in recognising that these types of cases give rise to disputed facts or assessments, so it would be rare that a landlord would be advised to seek summary judgment.⁶⁰

iii. Link between duty to make reasonable adjustments and proportionality test?

Section 15 makes no reference to reasonable adjustments, but the duty exists in section 20 and is in the background of the proportionality question, because it cannot be proportionate to treat a person in a way which results in a detriment if reasonable adjustments are available to remove a detriment.⁶¹ The duty to make reasonable adjustments arises where a disabled person is put at a 'substantial disadvantage ... in comparison with persons who are not disabled' by 'a provision, criterion or practice'.⁶² Six different Schedules in the Act apply to when the duty applies⁶³ with Schedule 4 being the relevant Schedule for premises. The reasonable adjustment analysis is not the same as proportionality, although there is a likelihood of harmonisation of the reasonable adjustments analysis with the proportionality balancing.⁶⁴

Failure to comply with the duty to make reasonable adjustments constitutes discrimination.⁶⁵ As Baroness Hale noted in *Akerman*,⁶⁶ it is discrimination under section 21(2) to fail to comply with the specific duties to make the reasonable adjustments which are required by the Act in particular contexts. In *General Dynamics Information Technology Ltd v Carranza*,⁶⁷ which was not cited in *Akerman*, there was no issue relating to discrimination arising out of disability under section 15, but the issue concerned the duty to make reasonable adjustments and s. 20(3) of the Act. As Judge David Richardson stated, 'Parties and Employment Tribunals should consider carefully whether the duty to make reasonable adjustments is really in play or whether the case is best considered and analysed under the

⁵⁴ See, for example, *Corby Borough Council v Scott* [2012] EWCA Civ 276, [2012] HLR 23; *Birmingham City Council v Lloyd* [2012] EWCA Civ 969; *Thurrock BC v West* (n 1); *Ker v Optima Community Association* [2013] EWCA Civ 579, [2013] HLR 37; *Sims v Dacorum BC* (n 1); *R (N) v Lewisham LBC* (n 1).

⁵⁵ *Pinnock* (n 1).

⁵⁶ *Powell* (n 1).

⁵⁷ See, for example, *R (JL) v Secretary of State for Defence* (n 1); *Southend-on-Sea Borough Council v Armour* [2014] EWCA Civ 231, [2014] HLR 23.

⁵⁸ *Akerman* (n 2) [36] (Baroness Hale) and [59] (Lord Neuberger).

⁵⁹ *Akerman* (n 2) [38] (Baroness Hale).

⁶⁰ *Akerman* (n 2) [60] (Lord Neuberger).

⁶¹ See I Smith and A Baker, *Smith and Wood's Employment Law* 12th edn (Oxford, Oxford University Press, 2015) 421.

⁶² Equality Act, s 20 sets out in detail the three requirements which comprise the duty.

⁶³ See Hepple (n 9) 95.

⁶⁴ I Smith and A Baker (n 61) 421.

⁶⁵ Equality Act 2010, s 21(2).

⁶⁶ *Akerman* (n 2) [15].

⁶⁷ *General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169.

new, robust, section 15'.⁶⁸ He continued, 'I have therefore concluded that the majority finding of a failure to make reasonable adjustments cannot stand.'⁶⁹ If this case had been put forward as a case of discrimination arising from disability, it would have been easier to analyse'.⁷⁰ The dynamics of the link between the duty to make reasonable adjustments and the proportionality test are yet to be worked out and may reshape the parameters of the proportionality test. It remains to be determined whether the duty to make reasonable adjustments will extend to modifying policies on rent arrears, for example, or be limited to physical aspects of premises.

D. Human rights less important than equality rights?

It is necessary to analyse the reasoning behind the differentiation in approach between article 8 and claims under section 15. Baroness Hale recognised that in cases where article 8 is the only defence, 'the court is simply not equipped to judge the weight of an individual's right to respect for her home against the weight of the interests of the whole community for whom the authority has to manage its limited housing resources'.⁷¹ That is well established following *Pinnock* and *Powell*. She then stated correctly that, 'No landlord is allowed to evict a disabled tenant because of something arising in consequence of the disability, unless he can show eviction to be a proportionate means of achieving a legitimate aim'.⁷² But the next sentence makes a conceptual leap which is not fully justified, when she stated that, 'He is thus obliged to be more considerate towards a disabled tenant than he is towards a non-disabled one'.⁷³ The problem with that statement is that this is not an obligation on the landlord, because the positive action permitted by s. 13(3)⁷⁴ does not impose an obligation on a landlord.

The other problematic aspect with Baroness Hale's statement is that it has the effect of incorporating the positive action permitted by s. 13(3) into a requirement for the proportionality test. Conflating the proportionality test with the desirability for positive action, which is rendered non-discriminatory due to section 13(3), may require a distortion of theoretical analysis. However, it is likely that it is inherent within Baroness Hale's analysis that the proportionality test includes consideration of whether there are possibilities to make reasonable adjustments or alternative ways for the landlord to achieve the legitimate aim which are not as discriminatory against the tenant. Baroness Hale does not make this explicit, but the duty to make reasonable adjustments is a special form of positive action, and treating a person more favourably under section 13(3) could require making reasonable adjustments.

Part of Baroness Hale's justification was a quote from herself in *Lewisham London Borough Council v Malcolm* that, 'people with disabilities are "entitled to have due allowance made for the consequences of their disability"'.⁷⁵ She did not deal specifically with the issue of whether section 15 Equality Act 2010 enables that to be done and did not explain how 'due allowance' should be interpreted. She circumvented that by justifying that the twin aims

⁶⁸ Ibid, [34].

⁶⁹ Ibid, [46].

⁷⁰ Ibid, [47].

⁷¹ *Akerman* (n 2) [29] considering what Lord Hope stated in *Powell* (n 1) [35].

⁷² *Akerman* (n 2) [31] (Baroness Hale).

⁷³ *Akerman* (n 2) [31] (Baroness Hale).

⁷⁴ Equality Act, s 13(3) states that, 'If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B'.

⁷⁵ *Lewisham London Borough Council v Malcolm* [2008] UKHL 43, [2008] 1 AC 1399 [61] in relation to the Disability Discrimination Act 1995.

identified in *Pinnock*⁷⁶ will not invariably trump that right, which is correct. She recognised that the second of the twin aims (to enable the authority to comply with its public duties in relation to the allocation and management of its housing stock) may on occasions have to give way to the equality rights of the occupier and in particular to the equality rights of a particular disabled person'.⁷⁷ She did not tackle the problem that just because a person is disabled, that does not magically increase limited housing resources. Personal circumstances are taken into account in making decisions as is implicit in Baroness Hale's statement that, 'The impact of being required to move from this particular place on this particular disabled person may be such that it is not outweighed by the benefits to the local authority or social landlord of being able to regain possession'.⁷⁸ This is a very welcome development in equality law for tenants even though the means by which it is reached may be questionable.

If the example is taken of a tenant who can no longer afford the rent due to having to work less hours due to a disability as a result of an accident, the landlord might be terminating the tenancy 'because of something arising in consequence of B's disability' under the wording of s. 15(1)(a), although this may be a contestable issue. Even though the tenancy is not being terminated because the tenant has a disability, but is purporting to be terminated as an unfortunate consequence of the disability, this may nevertheless amount to discrimination arising from disability under s. 15(1)(a), being a case of unfavourable treatment by terminating the tenancy due to inability to pay rent, which is as a result of the disability, unless the landlord can justify the termination. The problem for landlords is caused by the breadth of the wording of s. 15(1)(a), because the consequence of what Baroness Hale stated is that securing equality of treatment would nullify section 15(1)(b) in the vast majority of cases and places landlords at a serious disadvantage trying to justify the proportionality test. If a different example is taken where the reason for eviction is the behaviour of the tenant, if the behaviour arose because of the disability, the landlord will need, for example, to demonstrate that the health and/or safety of neighbours are adversely affected by the tenants' behaviour, so that the eviction is a proportionate means of achieving a legitimate aim.⁷⁹

Baroness Hale stated that the public policy considerations are different in relation to Equality Act claims.⁸⁰ There is a change in emphasis and weighting, therefore

When a disability discrimination defence is raised, the question is not simply whether the social landlord is entitled to recover the property in order to fulfil its or the local authority's public housing functions, but also whether the landlord or the local authority has done all that can reasonably be expected of it to accommodate the consequences of the disabled person's disability and whether, at the end of the day, the 'twin aims' are sufficient to outweigh the effect on the disabled person.⁸¹

That is a fair assessment of the position, but raises the question with public authority landlords why its limited housing stock should matter more for human rights cases than

⁷⁶ *Pinnock* (n 1) [52].

⁷⁷ *Akerman* (n 2) [31] (Baroness Hale).

⁷⁸ *Akerman* (n 2) [31] (Baroness Hale).

⁷⁹ Compare the position in *North Devon Homes Ltd v Brazier* [2003] EWHC 574, [2003] HLR 59 where David Steel J held that the tenant was being evicted because of the disability, which was unlawful, and there was no evidence that the landlord had formed the opinion that discrimination was justified in order not to endanger the health or safety of any person, so her eviction was not justified under the Disability Discrimination Act 1995.

⁸⁰ *Akerman* (n 2) [32] (Baroness Hale). This was a point raised by the Equality and Human Rights Commission.

⁸¹ *Akerman* (n 2) [32] (Baroness Hale).

equality cases. The justification for this point is not made in the judgments. It is also notable that Baroness Hale stated that ‘the court is well equipped to address’⁸² these issues with equality cases but not with human rights cases. Again the justification for this differentiation is not fully substantiated.

The effect on the disabled person has subjective connotations, so if the tenant would be suicidal if the local authority obtained possession, then Baroness Hale’s judgment indicates that there should be no order for possession, but if the effect on the tenant is less drastic, an order for possession could be given. Guidance is lacking as to how this should be applied, especially in borderline cases. Because of the comparatively harsh position taken in article 8 cases, it may be that this approach in *Akerman* offers an olive branch to tenants who fall in the category of disabilities without opening the floodgates in human rights cases.

Lord Neuberger adopts a different line of reasoning and justification from Baroness Hale for equality rights. Whilst following what was stated in *Pinnock*⁸³ and *Powell*⁸⁴ in relation to article 8, and restating that the vast majority of cases should be disposed of summarily and ‘it will be a very unusual case where such a defence could succeed’,⁸⁵ Lord Neuberger does not base his reasoning on an obligation to be more considerate towards a disabled tenant. Lord Neuberger’s rationale is based on section 35(1)(b) Equality Act 2010, that ‘the protection afforded by section 35(1)(b) is plainly stronger than the protection afforded by article 8’⁸⁶ and that, ‘the protection afforded by section 35(1)(b) is an extra, and a more specific, stronger, right afforded to disabled occupiers over and above the article 8 right’.⁸⁷ It is questionable whether Lord Neuberger is as a result marginalising the proportionality test in section 15(1)(b).

Lord Wilson agrees that where a defence is raised under section 35(1)(b) to an action for possession that there should be no presumption that the action is fit for summary disposal. He brings another dimension into the justification which is that ‘CPR r 55.8(2) calls for a careful evaluation at that initial stage whether the claim is genuinely disputed on grounds which appear to be substantial’. As provided in CPR 55.8(2),⁸⁸ if a claim ‘is genuinely disputed on grounds that appear to be substantial’, directions to trial should be given. Lord Wilson does not address specifically the issue of why this is not adopted when article 8 is the defence. He merely continues that ‘when such a defence is raised, the court should adopt a four stage structured approach ...’⁸⁹

E. Extension of proportionality in article 8 cases?

It was Lord Neuberger himself who raised tangentially the issue in *Pinnock*⁹⁰ of whether where the occupier has certain characteristics (including disability), there will be

⁸² *Akerman* (n 2) [32] (Baroness Hale).

⁸³ *Pinnock* (n 1).

⁸⁴ *Powell* (n 1).

⁸⁵ *Akerman* (n 2) [52] (Lord Neuberger).

⁸⁶ *Akerman* (n 2) [55] (Lord Neuberger).

⁸⁷ *Akerman* (n 2) [56] (Lord Neuberger).

⁸⁸ Civil Procedure Rules, Rule 55.8(2).

⁸⁹ *Akerman* (n 2) [64] (Lord Wilson).

⁹⁰ *Pinnock* (n 1) [64].

asymmetrical treatment in those cases and other cases under article 8. Accordingly, Lord Neuberger opened the door to the proportionality test in article 8 cases being accorded greater weight and significance in some cases when he stated

the suggestions put forward on behalf of the Equality and Human Rights Commission, that proportionality is more likely to be a relevant issue ‘in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty’, and that ‘the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases’ seem to us well made.⁹¹

Lord Neuberger repeated this in *Akerman*⁹² citing from his judgment in *Pinnock*.⁹³

What is salient about this is that Lord Neuberger’s statement is broader than the definition of disability in the Equality Act. The statement puts disability on an equal par with mental illness (which may of course be a disability depending on the individual’s circumstances) and ‘poor health and frailty’ which do not necessarily fall within the definition of disability. In such cases, it will be harder for the landlord to satisfy the court of the proportionality issue. Lord Neuberger does make it clear that statement refers to a defence raised under article 8 and not under the Equality Act when he states in *Akerman* ‘where the occupier is disabled, it is significantly less unlikely than in the normal run of cases that an article 8 defence might succeed’.⁹⁴ What is surprising, given Lord Neuberger’s punctilious attention to detail and accuracy, is that he does not deal with the discrepancy in the definition of disability and has single-handedly opened the door to anyone in poor health or frailty relying on this *obiter dicta* in an article 8 defence. This a welcome extension of the principle in *Pinnock*⁹⁵ beyond the ambit of disability, but encourages litigation by creating uncertainty in the law.

Baroness Hale formulated an interesting twist on what Lord Neuberger stated in *Pinnock*. Lord Neuberger stated in *Pinnock* that

If domestic law justifies an outright order for possession, the effect of article 8 may, albeit in exceptional cases, justify (in ascending order of effect) granting an extended period for possession, suspending the order for possession on the happening of an event, or even refusing an order altogether.⁹⁶

It was only two paragraphs later that Lord Neuberger made the statement about the suggestions put forward by the Equality and Human Rights Commission which he noted ‘seem to us well made’.⁹⁷ Baroness Hale in *Akerman* made a significant inversion of the order of what Lord Neuberger stated and consequently extended the law beyond the scope of what Lord Neuberger intended in *Pinnock*. Baroness Hale stated that the consequence of Lord Neuberger’s statement is that ‘The effect might justify granting an extended period for possession, suspending the order for possession on the happening of an event, or even refusing an order altogether’.⁹⁸ The juxtaposition of these two sentences by Baroness Hale

⁹¹ *Pinnock* (n 1) [64].

⁹² *Akerman* (n 2) [56] (Lord Neuberger).

⁹³ *Pinnock* (n 1) [64].

⁹⁴ *Akerman* (n 2) [56] (Lord Neuberger).

⁹⁵ *Pinnock* (n 1) [64].

⁹⁶ *Pinnock* (n 1) [62] (Lord Neuberger).

⁹⁷ *Pinnock* (n 1) [64] (Lord Neuberger).

⁹⁸ *Akerman* (n 2) [21] (Baroness Hale).

achieves a significant shift from Lord Neuberger's judgment. In addition, Lord Neuberger had qualified his statement by declaring that would apply 'in exceptional cases',⁹⁹ but Baroness Hale does not qualify it in this way.¹⁰⁰ Lord Neuberger had also stated that these would be 'in ascending order of effect',¹⁰¹ but Baroness Hale did not repeat that qualification, but rather presented them as being on an equilibrium and even keel, thus stretching the boundaries of the law further than even Lord Neuberger.¹⁰² The consequence in future cases may be that the boundaries between the proportionality tests in article 8 and in disability discrimination cases will be more closely aligned.

III. IMPACT ON PROPERTY RIGHTS OF DEFENCES OF DISABILITY DISCRIMINATION BEING RAISED BY TENANTS

Baroness Hale agreed¹⁰³ with what Lord Bingham stated in *Lewisham London Borough Council v Malcolm*¹⁰⁴ that it may be unlawful to evict a disabled person even though the disabled person had no other claim to remain in the property, which means that if the defendant succeeds in his defence that bringing proceedings amounts to discrimination by reason of his disability in breach of s. 15, then the court cannot make a possession order.¹⁰⁵ The Supreme Court may accordingly be creating new property rights for tenants with disabilities.

A. Positive discrimination of those with disabilities?

A disabled person can be treated more favourably than a person who is not disabled, because section 13(3) Equality Act provides that, 'A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B'. The distinguishing feature with discrimination, as recognised by Baroness Hale, is that

Whereas treating a man equally with a woman usually means treating him in the same way as a woman is treated, treating a disabled person equally with a non-disabled person may mean treating him differently from a non-disabled person. This is to ensure that he can play a full part in society despite his disabilities.¹⁰⁶

In order to decide whether the eviction is 'because of something arising in consequence of B's disability' under section 15(1)(a) Equality Act, the landlord would have to justify the treatment. There was no need for a comparison with how it would treat any other person.¹⁰⁷ Crucially 'it might have to behave differently towards a disabled tenant from the way in which it would behave towards a non-disabled tenant'.¹⁰⁸ In relation to the example of a tenant who earns a lower salary as a result of an accident which causes a disability and who accumulates arrears of rent, the question arises whether a landlord has to take steps to treat

⁹⁹ *Pinnock* (n 1) [62] (Lord Neuberger).

¹⁰⁰ *Akerman* (n 2) [21] (Baroness Hale).

¹⁰¹ *Pinnock* (n 1) [62] (Lord Neuberger).

¹⁰² *Akerman* (n 2) [21].

¹⁰³ *Akerman* (n 2) [17].

¹⁰⁴ *Malcolm* (n 75).

¹⁰⁵ *Akerman* (n 2) [17].

¹⁰⁶ *Akerman* (n 2) [2].

¹⁰⁷ *Akerman* (n 2) [18].

¹⁰⁸ *Akerman* (n 2) [18]. The use of the word 'it' in this context refers to the landlord or other provider.

this tenant differently from other tenants, for example, allow a much longer time for the tenant to discharge the arrears of rent.

The wording of section 15(1)(a) indicates *prima facie* that there cannot be negative treatment of a tenant, but to avoid taking proceedings for possession actually requires positive action, which is arguably positive discrimination towards those with disabilities. The only ground on which a landlord will not be obliged to take positive action towards a tenant with disabilities is if the landlord can demonstrate that the unfavourable treatment is a proportionate means of achieving a legitimate aim. A positive duty to advance equality, being proactive, sidesteps many of the limitations of the indirect discrimination provisions.¹⁰⁹ The Equality Act has widened the circumstances in which positive action is lawful. As Smith and Baker point out, the Equality Act is based on a neutral or symmetrical model of equality by giving the right not to be treated less favourably on protected grounds.¹¹⁰ It is necessary to differentiate positive discrimination which is usually unlawful, from positive action which comprises measures to promote equality. Sections 158 and 159 govern positive action which is a proportionate means of achieving legitimate aims. Section 158(2) permits any action which is a proportionate means of achieving one of three aims: to overcome or minimise disadvantage, meet the relevant needs, or enable or encourage participation of those who share a protected characteristic. The provisions are permissive, not mandatory, and important in extending what is permissible.¹¹¹ Although sections 158 and 159 are not mandatory, section 15 and section 20 of the Equality Act 2010 may render necessary some form of positive action by landlords in relation to people with disabilities, because otherwise it could amount to discrimination. Time will tell in the area of possession proceedings the full extent to which positive action will reshape property rights in landlord and tenant law.

B. Public sector equality duty- Extension of duties to disabled person living with tenant?

There is no private sector duty to advance equality. The public sector equality duty in section 149 Equality Act 2010, which applies to disabilities, requires public authorities to have due regard, in the exercise of their functions, to the need to eliminate discrimination, harassment and victimisation, to advance equality of opportunity and to foster good relations between different groups. The duty extends to ‘a person who is not a public authority but who exercises public functions’.¹¹² Specific reinforcement that disabilities must be taken into account is given in section 149(4) which provides that, ‘The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons’ disabilities’. The Equality and Human Rights Commission plays an important role in enforcement of this duty and can issue compliance notices and require specific action.¹¹³

The duty achieves what Hepple would term as transformative equality, because the provisions of section 149 are important tools in the drive to eliminate discrimination and

¹⁰⁹ Hepple (n 9) 26.

¹¹⁰ Smith and Baker (n 61) 353.

¹¹¹ Hepple (n 9) 158.

¹¹² Equality Act, s 149(2).

¹¹³ See Equality Act 2006, ss 31 and 32.

advance equality of opportunity.¹¹⁴ McColgan notes that the public sector equality duty ‘is a qualitatively different type of provision than those which prohibit discrimination, even discrimination by public authorities’.¹¹⁵ The duties to advance equality of opportunity in section 149(1)(b) and foster good relations between those who do and do not share the positive characteristic are not limited by the scope of the anti-discrimination provisions. McColgan highlights how this demonstrates ‘some movement away from a rigidly symmetrical approach to equality/discrimination even where what is statutorily framed as “positive action” (sections 158 and 159) is not at issue’, and rightly notes that the duty is contained within the ‘positive action’ provisions in Part 11 of the Act entitled ‘Advancement of Equality’.¹¹⁶ Hepple highlights the main defects in the duty as the lack of provision in the primary legislation for engagement with stakeholders and a low standard of judicial scrutiny.¹¹⁷ He is critical of the approach of governments that if voluntary methods do not work, legislation will be considered at a later date.¹¹⁸

It is notable that if the tenant does not have a disability, but someone living with the tenant has a disability, the public authority will have to take the rights of that disabled person into account in deciding whether to seek possession, because the decision of *Barnsley Metropolitan Borough Council v Norton*,¹¹⁹ which applied to section 49A Disability Discrimination Act 1995, will apply to section 149 Equality Act 2010.¹²⁰ The Court of Appeal in the *Norton* case held that the duty did not arise only where the rights of a disabled person under other specific legislation were involved, but was entirely general and applied to the council's decision to seek possession of the school house, because the council knew of the daughter's disability and the fact that she could be critically affected by a possession order. The council was under a duty to have such regard as was appropriate in the circumstances to those disabilities at that time and had acted in breach of duty before commencing proceedings and during those proceedings.

The second ground of appeal in *Norton* was that to make an order for possession was disproportionate having regard to article 8. Lloyd LJ, delivering the judgment of the court, considered that since the first ground of appeal of a breach of duty under section 49A Disability Discrimination Act 1995 was successful, it was not necessary to deal with the second ground of appeal concerning article 8.¹²¹ Lloyd LJ cited from Lord Neuberger's judgment in *Pinnock*¹²² in which Lord Neuberger was referring to article 8, but which Lloyd LJ stated was also relevant by way of analogy to section 49A of the 1995 Act.¹²³ Lloyd LJ highlighted the relevance of alternative accommodation from that quote of Lord Neuberger which would be addressed by the council. *Norton* demonstrates how judges find it easier to

¹¹⁴ See also Equality and Human Rights Commission ‘The Essential Guide to the Public Sector Equality Duty: England and Non-Devolved Public authorities in Scotland and Wales’ updated January 2015 http://www.equalityhumanrights.com/sites/default/files/publication_pdf/PSSED%20Essential%20Guide%20-%20Guidance%20for%20English%20Public%20Bodies.pdf

¹¹⁵ A McColgan, *Discrimination, Equality and the Law* (Oxford, Hart Publishing, 2014) 7-8.

¹¹⁶ Ibid, 97.

¹¹⁷ Hepple (n 9) 222-224.

¹¹⁸ Hepple (n 9) 223.

¹¹⁹ *Barnsley Metropolitan Borough Council v Norton* [2011] EWCA Civ 834, [2012] PTSR 56.

¹²⁰ *Norton* *ibid*, [34], [37] and [41] (Lloyd LJ).

¹²¹ *Norton* *ibid* (Lloyd LJ).

¹²² *Pinnock* (n 1) [64] ‘that proportionality is more likely to be a relevant issue “in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty”, and that “the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases” seem to us well made’.

¹²³ *Norton* (n 119) [29] (Lloyd LJ).

deal with disability than with article 8 due to the constraints imposed by *Pinnock*¹²⁴ and *Powell*.¹²⁵ The Court of Appeal in *Norton*¹²⁶ did not, however, quash the judge's decision to make the possession order, because the council could be left to give proper consideration to its equivalent duty under section 149 of the Equality Act 2010 when discharging its housing duties under the Housing Act 1996 to the defendants. Nevertheless, the effect of the public sector equality duty may lead to a reshaping of the scope of proprietary rights.

C. Ramifications of breadth of definition of disability

Disability has a very broad definition, heralding the possibility that the floodgates may be opened with thousands of tenants raising defences to possession actions. The definition in section 6 of the Equality Act 2010 is physical or mental impairment, and the impairment has a substantial and long-term adverse effect on the ability to carry out normal day-to-day activities. Schedule 1 Part 1 contains supplementary provisions on how disability is determined. The effect of an impairment is long-term if it has lasted for at least 12 months, is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected.¹²⁷ An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it, and but for that, it would be likely to have that effect.¹²⁸ An example given in the Government's Explanatory Notes to the Bill for this Act is a man with depression who finds even the simplest of tasks or decisions difficult, for example getting up in the morning and getting washed and dressed. He is also forgetful and cannot plan ahead. Together, these amount to a 'substantial adverse effect' on his ability to carry out normal day-to-day activities. The man has experienced a number of separate periods of this depression over a period of two years, which have been diagnosed as part of an underlying mental health condition. The impairment is therefore considered to be 'long-term' and he is a disabled person for the purposes of the Act. With evidence demonstrating that 9 per cent of the population in the UK had taken anti-depressants in the past 12 months,¹²⁹ even though many of them would not fall within the statutory definition of 'disability', the potential scope and implications are immense.

Some illnesses are specifically provided to be disabilities, specifically cancer, HIV infection and multiple sclerosis.¹³⁰ The following also offer guidance on the definition and determination of disability- Equality Act 2010 (Disability) Regulations 2010, the Equality Act 2010 Guidance on the Definition of Disability issued in accordance with the Equality Act 2010 s 6(5). Disability is also covered in Appendix A of the EHRC Code of Practice. As stated by Pitt, it is regrettable that having consolidated everything into one Statute that there is still a separate set of regulations on the definition of disability, so that it is necessary to refer to at least three different instruments on the single issue.¹³¹

¹²⁴ *Pinnock* (n 1).

¹²⁵ *Powell* (n 1).

¹²⁶ *Norton* (n 119).

¹²⁷ Equality Act 2010, sch 1 para 2.

¹²⁸ Equality Act 2010, sch 1 para 5(1).

¹²⁹ D Lewer *et al* (2015), 'Antidepressant use in 27 European countries: associations with sociodemographic, cultural and economic factors' (2015) 207(3) *The British Journal of Psychiatry* 221.

¹³⁰ Equality Act 2010, sch 1 para 6.

¹³¹ G Pitt, *Employment Law* 9th edn (London, Sweet and Maxwell, 2014) para 2-021.

In addition, Baroness Hale referred to the obligations which the United Kingdom has undertaken under the United Nations Convention on the Rights of Persons with Disabilities.¹³² This may affect the definition of disability in the Equality Act 2010. Article 1 states that, ‘Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’ The text of the Convention was agreed at the United Nations (UN) in December 2006. The UK signed the Convention on 30 March 2007 and ratified it on 8 June 2009. Article 2 defines discrimination on the basis of disability as meaning:

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

It is the ‘social model’ of disability which is set out in the UN Convention on the Rights of Persons with Disabilities, which focuses on the handicaps or obstacles placed on disabled persons by society, so that everyone with an impairment should be protected without the requirement that the impairment is long-term and substantial.¹³³ Hepple is critical of the ‘medical model’ of disability in English law in the Equality Act, which replicates the ‘medical model’ of disability from earlier legislation, because of the requirement to show a physical or mental impairment which has a long-term and substantial adverse effect.¹³⁴

The UN Convention does not impose liability on either public or private landlords, but imposes obligations on the State Party i.e. the UK Government. The Convention places obligations on the government to take steps to protect and promote disabled people’s human rights. While the Convention does not place direct legal obligations on public bodies, they must still act in a way that is compatible with disabled people’s human rights. This might include taking positive steps to meet the standards set out in the Convention.¹³⁵ While a case cannot be brought directly in the UK courts under the Convention, the Convention can be used as an interpretative tool in relation to the Human Rights Act. When interpreting the Human Rights Act, courts should take account of international law as well as decisions of the European Court of Human Rights.¹³⁶ The UN Convention on the Rights of Persons with Disabilities sets out in more detail than the European Convention on Human Rights the steps that the government must put in place to ensure disabled people’s human rights are protected and promoted.

As Baroness Hale stated in *Akerman*, ‘This is not an absolute obligation. The landlord is entitled to evict a disabled tenant if he can show that this is a proportionate means of achieving a legitimate aim’.¹³⁷ The Equalities and Human Rights Commission published a

¹³² *Akerman* (n 2) [26].

¹³³ Hepple, (n 9) 44-45.

¹³⁴ Hepple (n 9) 44.

¹³⁵ See Equality and Human Rights Commission Guidance, ‘The United Nations Convention on the Rights of People with Disabilities: What does it mean for you?’ available at <http://www.equalityhumanrights.com/publication/united-nations-convention-rights-people-disabilities-what-does-it-mean-you>

¹³⁶ See *Glor v Switzerland* (Application no. 13444/04, judgment on 30 April 2009) where the European Court of Human Rights referred to the Convention in a decision about whether disabled people were treated unfairly.

¹³⁷ *Akerman* (n 2) [27].

Report in December 2014 ‘Monitoring the Implementation of the UN Convention on the Rights of Persons with Disabilities: The UK Independent mechanism list of issues interim report’¹³⁸ which highlights numerous areas of concern by way of recommendations of 66 questions which it recommends that the Convention on the Rights of Persons with Disabilities Committee asks the UK. Apart from concerns about changes to housing benefit, the focus of housing is under article 9 regarding lack of accessible housing and no mechanism that guarantees accessible housing.

IV CONCLUDING REMARKS

The Supreme Court in *Akerman* may be creating a new dynamic in property rights for tenants with disabilities resulting in a paradigmatic shift in proprietary rights and establishing challenging hurdles for landlords to overcome in possession cases. Lack of horizontal effect of article 8 has meant that private landlords have escaped scrutiny under article 8, but the Equality Act 2010 is a net from which private landlords cannot escape. Since Equality Act defences are not suited to be dealt with summarily, the result is likely to be that numerous more possession cases will have to go to trial, and landlords will need to incur considerable expense and time in obtaining possession. Unfortunately, landlords may consequently be reluctant to rent initially to those with disabilities even though such discrimination is clearly unlawful. Faced with a choice between several tenants, it is not difficult to see where landlords’ preferences will lie. Whether the floodgates will be opened after the Supreme Court decision remains to be seen.

The structured approach to proportionality is a positive development for equality rights. It would be too simplistic to have a unified approach, especially bearing in mind that the ontogenesis of each provision is entirely different. The Supreme Court rightly rejected a universal test for proportionality which has strengthened rights in the Equality Act. The stringency and parameters of the proportionality test are now dependent on the legislative regime, and there is a need for adequate processes and procedural protections to enable proportionality to be steadfastly determined. The decision is important, because article 8 and disability discrimination cases will now evolve their own separate jurisprudence without being constrained by each other.

Proportionality in disability cases will necessarily focus on the susceptibility of the tenant to losing possession, and robust contours will be essential to ensure congruity and homogeneity in such cases. The question of whether a claimant satisfies the definition of disability may be a contested issue, especially in borderline cases, as the main weapon in preventing claims under the Equality Act. Those concerned with human rights will wish to see decisions on a par with equality rights. Although different public policy considerations are applicable in human rights and disability discrimination cases, it is highly significant that Lord Neuberger in *Pinnock* opened the door to article 8 cases being decided differently where very broadly defined disability, which is more extensive than in the Equality Act, is in issue, so that a defence under article 8 may be much more likely to succeed. This may lead to a slippery slope to confluence between the proportionality tests in article 8 and in disability

¹³⁸ <http://www.equalityhumanrights.com/publication/monitoring-implementation-un-convention-rights-persons-disabilities>

discrimination cases, which may over the course of time become more broadly analogous and lead to an overhaul of normative property rules.